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Taking Federalism Seriously

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TAKING FEDERALISM SERIOUSLY

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In 1976, the Supreme Court broke with forty years of New Deal-inspired commerce clause jurisprudence to strike what appeared to be a significant blow for federalism. In *National League of Cities v. Usery,*[1] the Court invalidated Congress's extension of the Fair Labor Standards Act (FLSA)[2] to state and local governments insofar as its provisions "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[3] As Justice Rehnquist explained:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.[4]

Almost ten years later, the Court abandoned this distinction in *Garcia v. San Antonio Metropolitan Transit Authority.*[5] Deriding the standards set forth in *National League of Cities,* the Court found that the normal operations of the political process in Congress sufficiently safeguarded the sovereign interests of states and communities. In an opinion delivered by Justice Blackmun, the Court essentially renounced its role as keeper of the

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1. 426 U.S. 833 (1976). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-20, 5-22, at 300-06, 308-18 (1978).

2. 29 U.S.C. §§ 201-219 (1985). The original act specifically excluded state and local government entities from its coverage. In 1966, Congress amended the Act to cover workers employed at state hospitals and schools. This extension was upheld by the Supreme Court. Maryland v. Wirtz, 392 U.S. 183, 194-95 (1968). In 1974, Congress extended the Act to all state employees, prompting the Court to overrule *Wirtz* in National League of Cities v. Usery, 426 U.S. 833, 853-54 (1976).

3. *National League of Cities,* 426 U.S. at 852. In accordance with the Court's tenth amendment cases, references in the text to states are intended to encompass local governments as well.

4. *Id.* at 845.

5. 469 U.S. 528 (1985).

"spirit of the Tenth Amendment."[6] As Justice O'Connor complained in dissent, "[A]ll that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."[7]

As one might expect, *Garcia's* resuscitation of the FLSA vis-a-vis the public sector, alarmed the intergovernmental community.[8] Seeking to avert a possible $3 billion increase in labor costs[9] and to salvage hard won collective bargaining agreements, state and local officials stormed Capitol Hill for legislative relief. On the surface, their success appeared to vindicate the *Garcia* majority. In what one lobbyist called an "extraordinary"[10] display of political clout, a bill allowing government employers to offer time-and-a-half compensatory time off in lieu of overtime pay[11] breezed through Congress without a single recorded (much less dissenting) vote and, within nine months of the *Garcia* decision, was promptly signed by President Reagan. The President praised the legislation for recognizing the "special burdens, responsibility, and character"[12] of state and local governments, but cautioned that the new law amounted to no more than a bandage for the wound inflicted on state and local governments by the *Garcia* Court:

> Although real improvement has been brought about by this legislation, I believe the constitutional principles of federalism must be recognized so that limits are placed on Federal regulation of State and local governments in a manner consistent with their special status in our system of government. In this and in other regards, federalism will remain a major priority of my Administration.[13]

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6. Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The *Fry* Court had declared: "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.*

7. *Garcia,* 469 U.S. at 588 (O'Connor, J., dissenting).

8. *See generally* N.Y. Times, Feb. 21, 1985, at Al, col. 1 (describing officials' fears that *Garcia* would sharply increase their labor costs and pave the way for further congressional intervention in state and local government).

9. Various efforts to estimate the *Garcia* decision's fiscal impact on state and local governments place the annual cost between $500 million and $3 billion. The Department of Labor anticipates an annual cost of approximately $733 million, the Congressional Budget Office $0.5 to $1.5 billion. *See* 52 Fed. Reg. 2025-28 (Jan. 15, 1987).

10. Cohodas, *Fast Congressional Action Solves Worker Overtime Issue,* 43 CONG. Q. 2379 (1985).

11. The legislation also absolved employers from retroactive liability by postponing the effective date of the 1974 amendments until April 1986. In addition, the legislation permits local governments to exclude certain hours of work in calculating overtime compensation for employees who work in two separate capacities for a city, and to amend the FLSA's definition of "employee" so that government workers could provide volunteer services to their community outside their scope of employment without having those hours count against their overtime thresholds. For the bill's other provisions, see Fair Labor Standards Amendment of 1985, Pub. L. No. 99-150 (1985).

12. Statement of the President On Signing the Fair Labor Standards Amendment of 1985 (Nov. 13, 1985).

13. *Id.*

This Article explores *Garcia's* implications for what Justice Black aptly called "Our Federalism."[14] Part I examines the rationale behind the *Garcia* majority's retreat from *National League of Cities* and posits that the Court has slighted the constitutional status of state and local governments as political sovereigns. Part II contends that, despite its immense symbolic impact, *Garcia* poses only a minimal practical threat to state and local autonomy. This conclusion is supported by the growing success state and local governments have enjoyed since President Reagan took office in attacking problems on a growing variety of public policy fronts. Part III identifies federal mandates and conditional grants-in-aid as today's most serious threat to a robust federalism and proposes an amendment designed to channel the anxiety spawned by the *Garcia* decision into meaningful protection of state and local governments under the Constitution.

I. THE *GARCIA* ILLUSION OF STATE SOVEREIGNTY

A. The Road to Garcia

In *National League of Cities,* a narrow majority of the Court, asserting that the states and their subdivisions are "coordinate element[s]"[15] in our system of government, sought to place certain aspects of state sovereignty beyond the reach of the commerce clause.[16] Justice Rehnquist launched this effort by identifying as "one [such] undoubted attribute"[17] the right "to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation."[18] Yet, Justice Rehnquist pointedly made no pretense to having exhaustively catalogued the various "integral . . . and traditional governmental functions"[19] which were to be afforded this immunity from congressional enactments.[20]

Portentously, Justice Blackmun conditioned his determinative fifth vote for Justice Rehnquist's opinion on the understanding that *National League of Cities* was establishing a balancing test under which a federal statute could regulate even traditional governmental functions if the national

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14. Younger v. Harris, 401 U.S. 37, 44 (1971).

15. *National League of Cities,* 426 U.S. at 849.

16. Justice Rehnquist limited the opinion so as not to implicate statutes enacted by Congress under the spending power, *id.* at 852 n.17, war powers, *id.* at 854 n.18, or the fourteenth amendment, *id.* at 852 n.17. For a discussion of how this limitation nearly emasculated the *National League of Cities* doctrine even before *Garcia,* see *infra* notes 23-30 and accompanying text.

17. 426 U.S. at 845.

18. *Id.* at 851. The FLSA regulations subsequently issued by the Department of Labor in the wake of *National League of Cities* simply listed those services given as examples by Justice Rehnquist as no longer subject to FLSA standards, and added two other services not listed in Justice Rehnquist's opinion: libraries and museums. *See* 29 C.F.R. §§ 775.3, 775.4 (1986).

19. 426 U.S. at 852.

20. *Id.* at 851 n.16.

interest in the regulation was "demonstrably greater" than the state's claim for an exemption.[21] In two pivotal offspring of *National League of Cities,* Justice Blackmun would side with the original dissenters to vanquish their fears that the "traditional government functions" test could emerge as a weighty obstacle to congressional regulation of the states.[22]

In *Federal Energy Regulatory Commission (FERC) v. Mississippi,*[23] a 5-4 majority upheld a federal utility statute that required state agencies to follow prescribed procedures in considering certain rate structures and operational standards set forth in the legislation. Although states remained free to adopt standards different from those suggested in the legislation, failure to consider the standards would result in federal occupation of the field.[24] Writing for the Court, Justice Blackmun viewed this conditional preemption of an activity as a permissible "program of cooperative federalism"[25] plainly within the reach of the federal commerce power, notwithstanding Justice O'Connor's strident objection that Congress had in effect "conscript[ed] state utility commissions into the national bureaucratic army."[26]

EEOC v. Wyoming[27] all but overruled *National League of Cities.* In an opinion by Justice Brennan, the Court upheld the 1974 extension of the Age Discrimination in Employment Act's (ADEA) prohibition against mandatory retirement laws to state and local governments. This prohibition applies to all positions except those for which age permissibly is deemed a bona fide occupational qualification (BFOQ).[28] Purporting to distinguish the Court's invalidation in *National League of Cities* of a parallel amendment to the FLSA, Justice Brennan found the ADEA's requirements less intrusive in that a state retained the discretion either to comply with the ADEA by establishing age as a BFOQ or to ensure the alertness of its employees through individual tests.[29] It was not by accident that the *EEOC* majority skirted the very point of the "traditional government functions" test as first articulated by Justice Rehnquist: that the determination of such

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21. *Id.* at 856 (Blackmun, J., concurring).

22. The Court also revisited the *National League of Cities* inquiry in two relatively peripheral cases. Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264 (1981), reiterated that federal statutes implicated the governmental function immunity only if they regulated the "States as States." *Id.* at 287. In United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), a unanimous Court held that the State of New York was not entitled to a *National League of Cities* exemption for its recently acquired Long Island Rail Road because regulation of railroads has traditionally fallen to the federal government. *Id.* at 686-87.

23. 456 U.S. 742 (1982).

24. *See* Public Utility Regulatory Policies Act of 1978, codified at 15 U.S.C. §§ 3203-3204, 16 U.S.C. §§ 824a-3, 2621-2623 (1982).

25. 456 U.S. at 767.

26. *Id.* at 775 (O'Connor, J., dissenting).

27. 460 U.S. 226 (1983).

28. 29 U.S.C. § 623(f)(1) (1982).

29. 460 U.S. at 232-33 (1983).

occupational qualifications was, as an attribute of state sovereignty, for public employers to make for themselves. Indeed, the transparency of Justice Brennan's attempt to circumvent *National League of Cities* signaled that its immunity for state and local governments was, if not already dead, at best "moribund."[30]

B. Garcia: *The States as Sovereign Interest Groups*

In *Garcia,* the *EEOC* majority forthrightly reversed *National League of Cities.*[31] The "traditional government functions" test, explained Justice Blackmun, had simply proved "unworkable in practice."[32] This, he asserted, left the line of cases prompted by Justice Rehnquist's opinion intolerably bereft of any organizing principles apart from unsatisfactorily "freestanding conceptions of state sovereignty."[33] Fortunately, in Justice Blackmun's view, this was now of little consequence.

The *Garcia* majority also reinterpreted the tenth amendment and its jurisprudence to establish that the Framers had already placed adequate political pressure points throughout the federal system to facilitate the safeguarding of state prerogatives: state control over electoral qualifications, the electoral college, equal representation of each state in the Senate and the election of those senators by the state legislatures.[34] "State sovereign interests," asserted Justice Blackmun, "are more properly protected by procedural safeguards inherent in the . . . federal system than by judicially created limitations on federal power."[35]

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30. *The Supreme Court, 1982 Term,* 97 HARV. L. REV. 70, 200 (1983) [hereinafter *The Supreme Court*].

31. Justice Blackmun does qualify *Garcia* by positing that more egregious affronts to state sovereignty might still bump up against some affirmative limits on federal actions regulating the states. *See Garcia,* 469 U.S. at 556. At bottom, however, *Garcia* reduces the *National League of Cities* immunity to a hollow set of "horrible possibilities that never happen in the real world." New York v. United States, 326 U.S. 572, 583 (1946). *See* Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine,* 99 HARV. L. REV. 84, 97 (1985) [hereinafter Field]. For instance, Congress still could not order a state to relocate its capital. *See* Coyle v. Oklahoma, 221 U.S. 559 (1911), *cited with approval in Garcia,* 469 U.S. at 556.

32. 469 U.S. at 546.

33. *Id.* at 550. In a classic *non sequitur,* Justice Blackmun also contended that the *National League of Cities* test, by bestowing a constitutional imprimatur on certain "traditional government functions," actually violated the spirit of federalism by somehow discouraging the states from meeting "the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands." *Id.* at 546. *National League of Cities* cannot fairly be read to have established any constraints on the reach of state and local governments in modern America. Rather, it sought only to "ordain[] an [inviolate] enclave of protected state functions." *The Supreme Court, supra* note 30, at 203. Indeed, as Justice Powell noted in dissent, Justice Blackmun would have had difficulty explaining "how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as 'laboratories.'" *Garcia,* 469 U.S. at 568 n.13 (Powell, J., dissenting).

34. *Garcia,* 469 U.S. at 550-51.

35. *Id.* at 552.

Neither line of the *Garcia* majority's reasoning conforms with the continued integrity that our Founding Fathers envisioned for the states as sovereignties under the proposed Constitution. Justice Blackmun's relegation of state and local governments to the political process is particularly disquieting for several reasons.

First, even by Justice Blackmun's own admission, changes in the federal government have diluted the states' influence in national politics.[36] Senators are now elected by popular election, voter qualifications and legislative apportionment are now largely regulated by Congress and federal courts, state political parties have, in many cases, eroded to the point of irrelevance, and, perhaps most importantly, the federal government has become so all-encompassing that Congress rarely hesitates to leapfrog over state governments to address what had traditionally been deemed local problems.[37] From a more pragmatic standpoint, the degree to which the effort to secure relief from *Garcia* met with such rapid success is more likely to prove the exception than the rule. For example, legislation introduced in response to *EEOC v. Wyoming* in June 1985 to permit the mandatory retirement of public safety officers at age fifty-five never made it out of the Senate Committee on Labor and Human Resources.[38] When the Court ruled in 1982 that local governments qualified for the "state action" immunity from antitrust actions only when carrying out a "clearly articulated and affirmatively expressed" state policy,[39] it took a coalition of mayors and county officials almost three years to prompt Congress to enact relief. And this relief was only for claims seeking treble damages, leaving local governmental entities exposed to the constant threat of injunctions.[40]

Most bothersome, however, is the Court's downgrading of state and local governments to the status of yet another special interest group or political action committee whose interests are protected, if at all, by the grace of Congress.[41] "That these were *governments* whose internal terms of employment Congress presumed to dictate," Professor Van Alstyne observes, "seemed [not] to make any difference."[42] Even Justice Douglas, not remembered by many as a champion of federal restraint, once dispar-

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36. *Id.* at 554.

37. *See id.* at 565 & 565 n.9 (Powell, J., dissenting); Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles,* 19 GA. L. REV. 789, 792-93 (1985) [hereinafter Howard].

38. Age Discrimination in Employment Amendments of 1985, S. DOC. No. 1240, 99th Cong., 1st Sess. (1985).

39. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 51 (1982).

40. *See* Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984).

41. *See Garcia,* 469 U.S. at 567 (Powell, J., dissenting); Kmiec & Diamond, *New Federalism is Not Enough: The Privatization of Non-Public Goods,* 7 HARV. J.L. & PUB. POL'Y 321, 328 n.33 (1984). *See also* Van Alstyne, *The Second Death of Federalism,* 83 MICH. L. REV. 1709, 1724 (1985) (contending that for the states "[e]ven to participate in [such] debate is in one sense to lose it") (emphasis in original).

42. Van Alstyne, *supra* note 41, at 1712.

aged the "notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress [as] foreign to and a negation of our constitutional system."[43]

Madison's *Federalist No. 45* leaves little doubt that, in crafting a national government of limited, enumerated powers, the Framers intended for the states to continue to predominate the regulation of "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."[44] This sphere of authority certainly included the delivery of valuable public services to their communities.[45] To be sure, the federal commerce power has since grown to encompass many private sector activities whose regulation once fell to the states, but it is only recently that Congress has stretched its reach to assert workaday control over state and local governments themselves.[46]

It was against this congressional overreaching that the *National League of Cities* Court lodged its expansively worded protest. A government that can no longer control its own internal modes of operation, as in *Garcia,* or one that amounts to little more than a "puppet of the national bureaucracy . . . to which Congress may assign problems for extended study,"[47] as in *FERC,* is one largely devoid of meaningful sovereignty.[48] Such second class citizenship hardly befits the "active sovereignty"[49] that, in Hamilton's words, was reserved to the states "by the whole tenor of the . . . Constitution."[50]

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43. New York v. United States, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). *See also* V. Ostrom, Garcia, Constitutional Rule, and the Central-Government Trap (Dec. 11, 1985) [hereinafter Ostrom] (unpublished manuscript on file at the University of Indiana) (finding the argument that the Framers chose to rely upon politics to delineate the spheres of state and federal authority to be, in light of the general theory of limited constitutions, "implausible").

As Attorney General Meese has argued: "The reason for restoring federalism is not because the states have somehow now proved themselves under the watchful parental eye of Congress and the Supreme Court. Federalism must be restored because it is a basic constitutional principle." Address by Attorney General Meese, The Conservative Political Action Conference (Jan. 30, 1986).

44. THE FEDERALIST No. 45, at 293 (J. Madison) (C. Rossiter ed. 1961).

45. *See, e.g.,* La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation,* 60 WASH. U.L.Q. 779, 791 (1982) (power to make political decisions includes power to determine the goods and services provided the community and financed through taxes).

46. *See, e.g.,* Texas v. United States, 730 F.2d 339, 356-57 (5th Cir. 1984).

47. *FERC,* 456 U.S. at 775 (O'Connor, J., dissenting).

48. *See* R. Nagel, Federalism as a Subject of Interpretation (Feb. 1986) (unpublished manuscript on file at the University of Colorado School of Law). Professor Nagel cogently argues that "governmental status . . . requires a capacity to inspire citizen loyalty by way of the kind of symbolism common to all governments . . . . [T]he symbolism of a government unable to control the pay or working hours of its own employees is the symbolism of powerlessness rather than sovereignty." *Id.*

49. THE FEDERALIST No. 45, *supra* note 44, at 290.

50. THE FEDERALIST No. 32, at 201 (A. Hamilton) (C. Rossiter ed. 1961).

In view of the importance the Framers attached to the continued viability of state governments,[51] Justice Blackmun's protestations over the unworkability of the "traditional government functions" test hardly amount to a justification for abandoning it.[52] His protest seems particularly hollow because it was the members of the *Garcia* majority who deliberately chose to befuddle the *National League of Cities* inquiry in the line of cases culminating in its reversal.[53]

Instead, one would hope, as did Madison, that the Court could rise to the task of refereeing "controversies relating to the boundary between the two jurisdictions."[54] Indeed, lower courts have successfully grappled with the analogous challenge posed by the various "home rule" provisions of some forty state constitutions.[55] Furthermore, had he

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51. THE FEDERALIST No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961). *See* Graglia, *How the Constitution Disappeared,* 81 COMMENTARY 19 (Feb. 1986).

52. *See* Howard, *supra* note 37, at 793-94. *See also* Ostrom, *supra* note 43 (contending that "persons knowledgeable of a general theory of a limited constitution [should be able to] construe a constitutional contract, so to speak, in light of the declared intentions of the framers"). The Court charted the preferred course for clarifying an unmanageable legal test in Illinois v. Gates, 462 U.S. 213 (1983). In an earlier line of cases grappling with the fourth amendment question of when hearsay information from an informant can support a finding of probable cause to issue a search warrant, the Court formulated what amounted to a multi-pronged flowchart that accomplished little more than to strike fear into the hearts of unsuspecting first year criminal law students. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). The *Gates* Court, rather than throwing up its hands and embracing the *Garcia*-like solution of either allowing or disallowing all hearsay evidence at magistrates' probable cause hearings, instead opted to replace the *Aguilar-Spinelli* test with a more straightforward "totality of the circumstances" approach that would lead to "practical, common-sense decision[s]." *Gates,* 462 U.S. at 238. *See The Supreme Court, supra* note 30, at 177-85.

53. *See* Van Alstyne, *supra* note 41, at 1717 (contending that "those Justices originally in dissent from Justice Rehnquist's analysis failed to treat it in the manner the Court has otherwise wisely tended to do in equivalent circumstances associated with great cases: not as the final word on the subject, but as the first words").

54. THE FEDERALIST No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961).

55. *See, e.g.,* Baggett v. Gates, 32 Cal. 3d 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982) (state laws seeking to assure fair labor practices may be applied to police departments); Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 226 (1984) (village ordinance banning possession of operable handguns did not violate home rule provision as being an enactment unrelated to local problems); Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969) (establishment of Real Estate Commission by state did not preclude enactment of ordinance designed to control "blockbusting" by brokers); Robin v. Village of Hampstead, 30 N.Y.2d 347, 285 N.E.2d 285, 334 N.Y.S.2d 129 (1972) (village lacked power to enact ordinance requiring that abortions be conducted in accredited hospitals only); State v. Hutchinson, 624 P.2d 1116 (Utah 1980) (state's Corrupt Practices In Elections Act left county governments to determine for themselves whether circumstances necessitate imposing a campaign disclosure requirement for city or county officials). *But see* City of La Grande v. Public Empl. Retir. Bd., 576 P.2d 1204 (Or. 1978) (narrowing earlier interpretations of Oregon's constitutional home rule provision to bar only those state laws implicating "modes of local government," in part because it is more proper for the political system to decide which level of government should pursue given "substantive social, economic, or other regulatory objectives"). For general discussions of the "home rule" movement in the law governing local governments, see Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the*

wished,[56] Justice Blackmun could have chosen from several promising theories as points of departure for fine tuning Justice Rehnquist's initial attempt at delineating a sphere of paramount state sovereignty.

First, in their *Garcia* dissents, Justices Powell and O'Connor echoed Justice Blackmun's own concurrence in *National League of Cities* in advocating a conventional balancing of the federal and state interests implicated by a congressional enactment.[57] Justice O'Connor emphasized the pivotal importance of "weighing state autonomy as a factor."[58]

Second, lower federal courts, including the district court which originally heard *Garcia,*[59] had also developed several encouraging approaches to the *National League of Cities* exemption.[60] The most promising among these was that offered by the Sixth Circuit in *Amersbach v. City of Cleveland.*[61] Under the *Amersbach* analysis, a governmental function qualified for an exemption if it: (1) benefited the community as a whole and was provided at little direct expense, (2) was undertaken for public service rather than profit, (3) constituted an especially suitable endeavor for the government because of a community wide need, and (4) was provided principally by the government.[62]

The pointed refusal of the *Garcia* majority to follow these alternative analyses is all the more ironic when contrasted with the Court's often demonstrated eagerness to engage in creative constitutional extrapolation on even thornier issues, such as the judicially crafted right to privacy or

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Courts, 48 MINN. L. REV. 643 (1964); Ellickson, *Cities and Homeowners Associations,* 130 U. PA. L. REV. 1519 (1982).

56. Justice Blackmun purports to demonstrate the unworkability of the *National League of Cities* inquiry largely by rejecting three "strawmen" not even supported by immunity advocates: a purely historical standard, *Garcia,* 469 U.S. at 543-44; a "uniquely" government functions standard, *id.* at 545; and "necessary" government services, *id.*

57. *See id.* at 562 (Powell, J., dissenting); *Id.* at 588 (O'Connor, J., dissenting). Professor Van Alstyne would go a step further than Justices Powell and O'Connor by explicitly tipping the scales in favor of the states. *See* Van Alstyne, *supra* note 41, at 1717-18. He would deem the very existence of a state or local activity to suffice "as clear evidence that the services it provides come within the felt responsibilities of government in the first instance, as determined solely by the constituents and representatives of that government." *Id.* at 1717. Congress could intervene only if it "could back its authority with a judicially acceptable reason" that amounted to "more than a mere naked preference to have state and local programs structured as Congress might like." *Id.* at 1717-18.

58. *Garcia,* 469 U.S. at 588 (O'Connor, J., dissenting).

59. *See* San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983).

60. *See Garcia,* 469 U.S. at 538-39 (citing lower court cases that address the *National League of Cities* inquiry). Justice Powell chides Justice Blackmun for failing to "carefully analyze[] the case law" and, as a result, mischaracterizing the lower courts' opinions as rendering "blanket pronouncements that particular things inherently qualified as traditional governmental functions or did not." *Id.* at 561-62 n.4 (Powell, J., dissenting).

61. 598 F.2d 1033 (6th Cir. 1979).

62. Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979).

the first amendment freedoms of speech and religion.[63] Whatever side one may take in the debate on judicial restraint that arises over such decisions, it was perhaps this inconsistency that incited the dissenters' unusually forthright and offended forecast of *Garcia's* forthwith reversal.[64] This new found reticence also unmasks the majority's invocation of judicial restraint as a shibboleth for a pronounced indifference to the prerogatives of state and local governments as sovereigns within our constitutional order.

II. FEDERALISM AFTER *GARCIA*: MUCH ADO ABOUT NOTHING MUCH (AT LEAST FOR NOW)

In their alarm at the Hamiltonian overtones of Justice Blackmun's reversal of *National League of Cities,* critics of *Garcia* have sometimes unwittingly exaggerated the decision's practical consequences. Beyond the immediate irritant of state and local governments having to conform with the FLSA, *Garcia* is typically said to mean increased costs, budget restrictions, and fewer opportunities for innovations by the state and local officials.[65]

On the surface, such analyses would appear both to overstate the practical value of *National League of Cities* and to overestimate the resolve of a new generation of state and local leaders to join President Reagan in "tak[ing] Government back to the people."[66] At bottom, however, these overstatements reveal an understandable discomfort at the overruling of a celebrated decision that had come to serve as a "rallying cry" for enhanced protection of state prerogatives under both the Constitution and federal law.[67]

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63. Professor Nagel has concluded that legal scholars and, more importantly, the federal bench, have become preoccupied with individual rights at the states' expense: "Those decisions that do deal unambiguously with structural values for their own sake demonstrate less explanatory creativity than do decisions dealing with rights, a fact that suggests a relative lack of judicial interest in structural matters if not lower quality opinions." Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective,* 1981 SUP. CT. REV. 81, 83-84. Yet this distaste for decisions addressing governmental structure appears to be confined only to those cases implicating federalism. For instance, in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), the Court did not hesitate to rock the federal government by declaring the legislative veto unconstitutional, despite its presence "[in] nearly 200 . . . [statutes] . . . and its importance to Congress." *Id.* at 967 (White, J., dissenting).

64. *See Garcia,* 469 U.S. at 580 (Rehnquist, J., dissenting); *Id.* at 589 (O'Connor, J., dissenting).

65. *See* Freilich, Greenhagen & Lamkin, *The Demise of the Tenth Amendment: An Analysis of Supreme Court Decisions Affecting Constitutional Federalism,* 17 URB. LAW. 651, 653 (1985).

66. Address by President Ronald Reagan to the National Governor's Association, The White House (Feb. 26, 1984) [hereinafter 1984 NGA Speech].

67. N.Y. Times, Feb. 20, 1985, at A1, col. 6.

A. *Placing* National League of Cities *in Perspective*

As discussed in Part I, *National League of Cities* was already standing on one leg before *Garcia* by dint of Justice Brennan's handiwork in *EEOC*.[68] But, notwithstanding conventional wisdom in some quarters, the *National League of Cities* rule served as an extremely modest restraint on Congress even at the doctrine's high water mark.[69] The renowned tenth amendment cases that precipitated the court packing crisis had sought to cabin the New Deal by carving out from interstate commerce a series of "purely local"[70] commercial activities that were to be regulated, if at all, exclusively by the states.[71] By contrast, *National League of Cities,* despite its far reaching rhetoric, was carefully limited[72] to a very narrow issue: whether the commerce clause empowered Congress to regulate the states themselves in the performance of their sovereign functions.[73] Writing for the Court, Justice Rehnquist, undoubtedly seeking to preserve a bare majority,[74] expressly declined to speculate whether the "traditional government functions" test applied to federal statutes enacted pursuant to the spending power,[75] the war powers,[76] or the fourteenth amendment.[77]

As one might have expected, these qualifications led courts to confine the "traditional government functions" inquiry to the commerce clause context.[78] Less than a week after handing down *National League of Cities,*

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68. *See supra* notes 30-33 and accompanying text.

69. For an especially stinging and over-reaching criticism of *National League of Cities,* see Cox, *Federalism and Individual Rights Under the Burger Court,* 73 Nw. U.L. Rev. 1 (1978).

70. Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936).

71. *See, e.g.,* United States v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act declared unconstitutional); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act declared unconstitutional). *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 157-61 (2d ed. 1983).

72. *See* EEOC v. Pennsylvania Liquor Control Bd., 503 F. Supp. 1051, 1053 (M.D. Pa. 1983).

73. *See National League of Cities,* 426 U.S. at 852; Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 289-90 (1981).

74. *See supra* notes 28-29 and accompanying text.

75. *See National League of Cities,* 426 U.S. at 852 n.17. In his scathing dissent, Justice Brennan flouted the majority opinion by suggesting that Congress could circumvent the Court's new restrictions on the commerce clause power by "conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards . . . ." *Id.* at 880 (Brennan, J., dissenting).

76. *See id.* at 854-55 & n.18.

77. *See id.* at 852 n.17.

78. *See, e.g.,* New Hampshire Dep't of Employment Serv. v. Marshall, 616 F.2d 240, 247 (1st Cir.), *appeal dismissed,* 449 U.S. 806 (1980) (amendments to the Federal Unemployment Tax Act were not based on the power of Congress under the commerce clause and were not rendered unconstitutional by the *National League of Cities* decision); Jennings v. Illinois Office of Educ., 589 F.2d 935, 938 (7th Cir.) (*National League of Cities* test is inapplicable to a statute enacted under the war powers), *cert. denied,* 441 U.S. 967 (1979). *See generally* Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions,* 132 U. Pa. L. Rev. 289, 296-98 (1984).

the Supreme Court itself, in an opinion by Justice Rehnquist, reaffirmed that Congress could exercise the fourteenth amendment enforcement powers to apply Title VII of the Civil Rights Act to public employers on the same terms as to private employers.[79] *National League of Cities,* notwithstanding the stir it had created just four days earlier, was cited only once and in only an obscure footnote distinguishing it as a commerce clause case.[80]

As for the hundreds of conditional grants-in-aid to the states, the courts uniformly continued to employ a longstanding beggars-cannot-be-choosers rationale to uphold whatever restrictions Congress imposed on the use of federal funds. Because states participate in such programs only "voluntarily," it is reasoned, they remain free to avert affronts to their sovereignty by simply refusing the grants.[81] And even under the commerce clause, the *FERC* Court subsequently established that Congress could impose conditions upon the continuation of state regulation in any field that could be preempted by the federal government.[82]

Because this flexing of congressional muscle encroached upon the very state prerogatives ostensibly insulated from federal regulation by *National League of Cities,* the "traditional government functions" immunity in truth amounted to little more than a sometimes irritating requirement that Congress be careful to specify somewhere in a piece of legislation that it was exercising a power beyond the reach of the *National League of Cities* strictures.[83] *Garcia,* therefore, appears to mean little in terms of practical consequences beyond reintroducing the FLSA to state and local government employment.

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79. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *See* Hunter v. Underwood, 105 S. Ct. 1916 (1985).

80. *See Fitzpatrick,* 427 U.S. at 453 n.9.

81. *See* South Dakota v. Dole, 107 S. Ct. 2793 (1987) (state acceptance of federal highway funds is voluntary; thus, conditioning receipt on adoption of minimum drinking age is valid use of Congress' spending power); Bell v. New Jersey, 461 U.S. 773, 790 (1983) (state's participation i. the Elementary and Secondary Education Act of 1965 was voluntary; therefore, regulation under the Act does not violate the tenth amendment); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (holding that tax imposed under Title IX of the Social Security Act of 1935 does not impair the essence of state sovereignty); Rotunda, *supra* note 78, at 296-97. *See also* La Pierre, *supra* note 45, at 860. In Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981), the Court did offer, without any elaboration, that there "are limits on the power of Congress to impose conditions on the States pursuant to its spending power." But the courts have yet to identify any such limits and these would no doubt be limited to especially egregious infringements on state sovereignty.

82. *See FERC,* 456 U.S. at 771; *supra* notes 28-29 and accompanying text; Rotunda, *supra* note 78, at 323.

83. La Pierre, *supra* note 45, at 879. For instance, most lower federal courts that faced the question which confronted the Supreme Court in *EEOC v. Wyoming* upheld the extension of the ADEA to public employers in part on the grounds that, whatever the outcome under *National League of Cities,* Congress could have prohibited such age discrimination pursuant to the fourteenth amendment. *See, e.g.,* EEOC v. Elrod, 674 F.2d 601, 603-09 (7th Cir. 1982); La Pierre, *supra* note 45, at 876 & n.373.

B. *State and Local Government in the 1980s:* Garcia *as a Sideshow*

That *Garcia* has had little immediate impact on federalism has also been forcefully demonstrated by how the nation's governors and mayors have, except for the FLSA struggle, gone on about the business of governing as if Justice Blackmun's opinion were little but an anachronistic nuisance. To borrow the words of longtime government columnist James Kilpatrick, it has become "increasingly evident" to all except, it seems, those constituting the *Garcia* majority that:

> the state governments, as a group, are governing more responsibly than the national government. The most interesting political activity these days is often not in the national capital, but in the state capital. The tendency is to look at Congress with contempt, and to the statehouses . . . with respect. The spirit of the 10th Amendment, enfeebled and impoverished, may not be dead after all.[84]

Indeed, as a new breed of "doers and innovators"[85] take control of the governors' mansions and city halls, a veritable blossoming of imagination at the state and local levels of government promises to pioneer our country into the 1990s.[86] For example, numerous states and cities, seeking to revitalize their economies, have teamed with private investors to attract seed capital for high risk business ventures. Although the President's proposal for federal enterprise zones remains bogged down in Congress, twenty-seven states have forged ahead on their own. The 1300 plus enterprise zones that they have established since 1981 are credited with creating over 75,000 jobs and triggering nearly $2.5 billion in capital investment.[87] At last count, twenty-four states had begun to alter their welfare systems through work related alternatives to outright payments,[88] and thirty-four had enacted civil justice programs designed to alleviate the liability insurance crisis plaguing professionals and small businesses.[89]

State and local governments have also made impressive gains on the education front, arresting what many had feared was a rising tide of mediocrity threatening our economic future. Some 250 special task forces have devised and, in many cases, already implemented countless initiatives

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84. Wash. Post, Feb. 11 1986, at A17, col. 1. *See also* 1984 NGA Speech, *supra* note 66 (welcoming "the renaissance of direct involvement—whether in the local schools or in neighborhood-watch programs—and the reemergence of State and local government as significant forces in determining the future of our country and the quality of life of our people").

85. Wash. Post, Feb. 26, 1986, at A17, col 1.

86. *See* The Committee on Federalism and National Purpose, To Form a More Perfect Union 5 (1985) (reporting that the "states have shown tremendous capacity for innovation in education, economic development, controlling health care costs and other fields"); N.Y. Times, Sept. 26, 1986, at A14, col. 1.

87. *See* Verstanding, Enterprise Zone Notes (Sept. 1986).

88. N.Y. Times, March 30, 1987, at A8, col. 1 (nat'l ed.).

89. *See* Geisel & Taravella, *Tort Reform Explodes: 34 States Enact Laws to Help Solve Liability Crisis,* BUS. INS. 1 (Aug. 18, 1986).

involving teacher training and certification, merit pay, teacher career ladders, innovative student testing, and increased financial support.[90]

But it is with respect to exercising fiscal discipline that the federal government could most stand to learn from state and local actions. While the federal government continues to have record deficits, state and local governments have repeatedly run in the black with healthy surpluses: $58.3 billion in 1985, and a record $64.4 billion in 1984.[91] Virtually all city and state budgets, unlike the federal government's, are balanced year after year.

These merit badges of political courage have not, of course, come easily. City administrations, caught up in an almost frenzied efficiency wave,[92] have coped with shrinking financial resources by adopting innovative salary plans, contracting out various services, and instituting users' fees.[93] Virtually all fifty states have complied with balanced budget requirements[94] through a combination of tax increases[95] and a variety of austerity measures, ranging from hiring limits to deep spending reductions.[96]

Such actions are politically distasteful at any level of government, but state and local leaders stand a better chance of being rewarded (or at least of not being punished) for formulating budgets responsibly.[97] State and local governments last operated in the red in 1967, when expenditures exceeded receipts by $1.1 billion.[98] Over that same period, the federal government has *averaged* a $48.6 billion deficit, enjoying just one surplus of $8.4 billion in 1969.[99] This dramatic disparity in performance has not escaped the notice of the American people. In all, an overwhelming majority of the public believes that state and local governments spend tax dollars and deal with problems more wisely than the federal government.[100]

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90. *See* D. DOYLE & T. HARTLE, EXCELLENCE IN EDUCATION: THE STATES TAKE CHARGE 19-39 (1985).

91. *See* Council of Economic Advisers, The Economic Report of the President 343 (Feb. 1986) (Table B-76) [hereinafter EROP].

92. Peirce & Guskind, *Fewer Federal Dollars Spurring Cities to Improve Management and Trim Costs,* Nat'l L. J. 506 (Mar. 1, 1986).

93. *See id.*

94. Forty-four state governments operate under a constitutional mandate to balance their budgets. In Arkansas, Connecticut, Maine, Mississippi, and New Hampshire, a balanced budget is required by statute. Vermont is the only state that does not have a balanced budget requirement. *See* Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 141 (1985-1986 ed.).

95. Georgia is the only state that has not enacted some form of tax increase over the past five years. *See id.* at 74.

96. *See* Wash. Post, July 31, 1983, at A1, col. 6.

97. As government more closely approximates the Montesquieuan ideal of a republican community, the more readily its citizens will appreciate a tangible trade off between tax increases and spending reductions—a link nearly impossible to discern in the discombobulated federal budget process. *See* Tushnet, *Federalism and the Traditions of Political Theory,* 19 GA. L. REV. 981, 989 (1985).

98. *See* EROP, *supra* note 91, at 373 (derived from Table B-76).

99. *See id.*

100. CBS News, The State of the Union 19 (Jan. 27, 1986) (Martin Plissner ed.).

C. *The Reagan Administration and Federalism: A Governor Never Forgets*

It is not by accident that such a resurgence of creative government in our state capitols and cities has taken place during Ronald Reagan's presidency. With the frustrations of grappling with Washington as a governor still fresh in his mind, President Reagan took office in 1981 determined to stage "a quiet federalist revolution."[101] The President has since doggedly waged this battle on three primary fronts: tax base sharing, deregulation, and decentralization.

1. Sharing the Tax Base

Since 1981, the unprecedented Economic Recovery Tax Act has opened up billions of dollars worth of maneuvering room for states and cities in the national tax base. The Tax Act also required that these savings be locked into place through indexing, and the President has since held a firm and well- publicized line against "usurping revenue sources which otherwise would [be] available to state and local governments."[102] As a result, the federal government's share of tax receipts dropped from 65.3% in 1981 to 62.1% in 1983, leveling off at an estimated 62% in 1985. This is the federal government's smallest share of the overall tax base since World War II.[103]

In an address to the National Association of County Officials, the President reiterated his belief that the most effective way to ensure a robust federalism was

> to continue to bring down the federal government's share of the tax burden instead of confiscating and preempting so much of the tax source . . . . It would be a lot better if we get back to only taxing what should

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101. Address by President Ronald Reagan to the National Conference of State Legislatures, Atlanta, Georgia (July 30, 1981).

102. Message to Congress Transmitting Proposed Legislation (Feb. 25, 1983).

103.

Year	Federal Receipts as % of Total Gov't Receipts
1929	33.6
1939	43.5
1949	69.2
1954	70.9
1964	66.0
1974	63.2
1980	64.5
1981	65.3
1982	63.3
1983	62.1
1984	62.1
1985 (estimated)	62.0

Advisory Commission on Intergovernmental Relations, *supra* note 94, at 11.

> be our fair share and leaving you tax sources out there that you can use for problems which you see at your own level and have decided to do something about.[104]

2. *Deregulation*

State and local governments were among the principal beneficiaries of the efforts of Vice President Bush's Task Force on Deregulation. They received immediate one-time savings of an estimated $4 to $6 billion and perpetual relief that could be worth as much as $2 billion annually.[105] The President has pledged to continue the Task Force's efforts by relaxing federal regulations that impinge on state prerogatives and can be changed without congressional approval.[106] In the same spirit, the Domestic Policy Council is evaluating various proposals to require Congress to foot the bill for any regulatory mandates it imposes on the states.[107] Finally, the President, lest anyone in the executive branch get the wrong, heavy-handed idea from *Garcia,* recently issued a ten point Statement of Federalism Principles (Box 1) intended to guide the cabinet agencies in both their formulation and implementation of regulatory policy.

3. *Decentralization*

Based on a more ambitious proposal in the President's 1982 budget to replace nearly eighty-four categorical grants-in-aid with seven broad based block grants, Congress enacted nine block grants that consolidated fifty-six categorical programs.[108] In addition to reducing the paperwork burden on state and local governments by nearly five million manhours per year,[109] these block grants, by allowing state and local officials to assess their own priorities, have enabled them to exercise "considerable discretion within a broadly defined program area . . . [and thus become] increasingly important . . . policy makers for Federal grant programs, not middle managers for Federal agencies."[110]

With the notable exception of the Job Training Partnership Act of 1982 (JTPA),[111] Congress has rebuffed the Administration's subsequent propos-

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104. Address by President Ronald Reagan to the National Association of County Officials, Washington, D.C. (Mar. 4, 1985).

105. Vice Presidential Task Force on Deregulation, Reagan Administration Regulatory Achievements at 69 (Aug. 11, 1983).

106. 1984 NGA Speech, *supra* note 66.

107. *Cf.* The Intergovernmental Regulatory Relief Act of 1985, S. 483, 99th Cong., 1st Sess. (1985) (requiring federal compensation for the additional direct costs incurred by state and local governments in complying with intergovernmental regulations).

108. *See* Office of Management and Budget, Federalism: What Happened in 1981-84 II-1 (1985) (unpublished memorandum on file at the Office of Management and Budget).

109. *Id.* at 5.

110. Office of Management and Budget, Special Analyses of the FY 1987 Budget of the United States Government H-24 (1986) [hereinafter Special Analysis H].

111. Pub. L. No. 97-300, 96 Stat. 1322 (codified at 29 U.S.C. § 1501 (1982)).

als to provide state and local officials with more flexibility in administering federal grants.[112] Yet the JTPA block grant has been such a success that one wonders why its enactment has proven the aberration rather than the rule. By replacing the Comprehensive Employment and Training Act (CETA) and ending the infamous bureaucracy it had engendered, JTPA put the nation's governors in the driver's seat. Working with Private Investment Councils, state and local officials responded by creating over 545,000 jobs in 1985 alone. Nearly ninety-four percent of these jobs went to the economically disadvantaged.[113]

Most recently, the President proposed three additional block grant initiatives in the FY 1987 budget. A new $3.3 billion transportation block grant would have allowed states to refurbish roads, bridges, and transit systems according to their own priorities. The primary health care block grant would have been expanded to include narrow categorical programs for black lung clinics, migrant worker health, and family planning. Finally, a new pollution control block grant would have consolidated seven separate programs touching on all aspects of the environment.[114] These proposals received little serious consideration by Congress. In his proposed FY 1988 budget, the President has resubmitted more modest block grant proposals for secondary and rural highways and family planning programs.[115]

The result of the President's effort to rein in the federal government? As David Broder reports,

> For every inch Reagan has moved Washington out of domestic policy responsibility, he has created irresistible pressure for the states to move

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112. In his 1982 State of the Union Address, the President outlined an ambitious $50 billion initiative that was quickly dubbed the "New Federalism Initiative." It comprised three major components: (1) the states were to assume complete responsibility for financing the AFDC and Food Stamps programs, while the federal government would take over a restructured Medicaid system; (2) forty federal programs were to be turned back to the states together with excise taxes to finance them; and (3) ten block grants were to consolidate selected education, welfare, employment, and housing categorical programs. Ultimately, however, the President never sent any legislation up to the Congress because of heated disagreements within the intergovernmental community over the particulars of the proposal and the political world's growing preoccupation with the 1982 recession. *See generally* Williamson, *The 1982 New Federalism Negotiations,* 13 PUBLIUS 14 (1983).

In 1983, the President submitted legislation to consolidate 34 of the programs proposed for turnback in 1982 into four "mega-block" grants that would have given the states especially broad leeway in using the federal funds. The proposal received only one relatively uneventful hearing before the Joint Economic Committee. In 1984, the Administration proposed four block grants, three of which would have consolidated ongoing categorical programs, and a fourth to provide $50 million in new appropriations for the states to use in training math and science teachers. Congress passed only the latter.

Thus, despite President Reagan's focus on block grants throughout his first term, as of FY 1984, block grants still received less than 15% of total federal grant-in-aid dollars. *See* Office of Management and Budget, Federalism: What Happened in 1981-84 *supra* note 108, at II 1-12.

113. *See* 1984 NGA Speech, *supra* note 66.

114. *See* Special Analysis H, *supra* note 110, at H-4 to H-7.

115. *See* Office of Management and Budget, Special Analysis of the FY 1988 Budget of the United States Government H-1, H-12 (1987) [hereinafter Special Analysis I].

> in .... The initiative on education, social and most economic and environmental issues now rests in state capitols rather than in the U.S. Capitol and the White House.[116]

As the National Governors' Association heard at the White House in February 1986, the President "happen[s] to think that [is] just what the Founding Fathers had in mind."[117]

D. Beyond the "Traditional Government Functions" Test: Garcia *as a Harbinger of Further Erosions of Federalism*

Then just what is it about *Garcia* that has led critics to decry it as the "Second Death of Federalism?"[118] For the reasons catalogued above, it is indeed tempting to dismiss *Garcia* as having little impact aside from ending an already narrowed and discreet doctrine.

Yet *Garcia* did more than upend the "traditional government functions" test. In so sweepingly repudiating a decision that had come to be read as a paragon of federalism, Justice Blackmun's opinion installed in the United States Reports a vision of states' rights that threatens to spill over into other jurisprudential contexts where the *National League of Cities* spirit still reigns.

On its own terms, *National League of Cities* can be read as a logical extension[119] of cases in which the Court has openly fretted over the role of the states in our federal system. By invoking the *Pullman*[120] or *Younger*[121] abstention doctrines, for example, the Justices have repeatedly ordered lower courts to stay their proceedings so that state court litigation can run its course.[122]

State and local governments have always been allowed considerable leeway under the dormant commerce clause when maintaining the environment,[123] and they now enjoy an entirely free hand when participating in a

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116. Wash. Post, Dec. 8, 1985, at A6, col. 1.

117. 1984 NGA Speech, *supra* note 66.

118. Van Alstyne, *supra* note 41.

119. *See* L. TRIBE, *supra* note 1, at § 5-22, at 309.

120. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

121. Younger v. Harris, 401 U.S. 37, 44 (1971) (overruling lower court order to stay state court proceeding out of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

122. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 52, at 302-20 (4th ed. 1983).

123. *See, e.g.*, Maine v. Taylor, 106 S. Ct. 2440 (1986) (Maine statute banning importation of live baitfish does not violate the commerce clause because ban served legitimate local purpose of protecting fisheries); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (Detroit's Smoke Abatement Code was constitutional as applied to owners of ship prosecuted for emitting dense black smoke on ship that operated in interstate commerce).

commercial market as a buyer or seller.[124] The Court defers to state and local expertise in school financing,[125] prison management,[126] and law enforcement,[127] and only sparingly reviews decisions by local governments to exercise the zoning[128] or takings[129] powers for policy purposes having little to do with conventional land-use planning.[130] Federal statutes are interpreted restrictively so as not to preempt overlapping state measures.[131] Most recently, and in pointed contrast to its decision in *Garcia,* the Court has broadened cities' immunity under federal antitrust laws[132] and emphatically invoked the eleventh amendment to curtail the states' susceptibility to suit in federal court.[133]

But with its broad rhetoric zeroing in on the structural importance of state and local governments, *National League of Cities* transcended both

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124. *See, e.g.,* White v. Massachusetts Council of Constr. Employees, 460 U.S. 204 (1983) (city that expended only its own funds in entering construction contracts for public projects was a market participant and not subject to restraints of the commerce clause); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (commerce clause does not prohibit a state from entering the market as purchaser of potential articles of interstate commerce where the state restricts its trade to its own citizens).

125. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (concluding that Texas system was "rationally related" to a legitimate state purpose).

126. *See* Procunier v. Martinez, 416 U.S. 396, 405 (1974) (Court refuses to invalidate Correctional Department's guidelines concerning mail censorship in prisons).

127. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (Court refuses to enjoin police department from searching and using chokeholds); Rizzo v. Goode, 423 U.S. 362, 378 (1976) (Court refuses to intrude on discretionary authority of local authorities to deal with citizen complaints against police officer).

128. *See* City of Renton v. Playtime Theatres Inc., 106 S. Ct. 925 (1986) (Court upholds zoning ordinance that prohibits adult theatres from locating within 1,000 feet of residential areas); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (Court upholds zoning ordinance which restricts land use to one family dwellings); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (court states that it is up to state legislature to correct zoning plan that does not serve the general welfare of its citizens), *cert. denied,* 424 U.S. 934 (1976).

129. *See, e.g.,* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (establishing that courts should not interfere "where the exercise of the eminent domain power is rationally related to a conceivable public purpose").

130. *See, e.g.,* Young v. American Mini Theatres Inc., 427 U.S. 50, 71 (1976) (upholding regulation of adult movie theaters).

131. *See, e.g.,* Hillsborough County v. Automated Medical Laboratories Inc., 471 U.S. 707 (1985) (FDA regulations regarding collection of blood plasma does not preempt local ordinance); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (federal law does not preempt state authorized award of punitive damages); California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 395 (9th Cir. 1985) (Title VII preemption provision does not prevent states from extending nondiscrimination laws to other areas).

132. *See, e.g.,* Fisher v. City of Berkeley, 106 S. Ct. 1045 (1985) (rent ceilings on residential property do not violate Sherman Act); Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985) (municipality's anticompetitive activities exempt from federal antitrust laws).

133. *See, e.g.,* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 107 (1984) (reviewing recent restrictions on such suits and barring immediate action because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

these contextual federalism cases and its own "traditional government functions" test to erect a judicial monument to state sovereignty throughout constitutional law.[134] As such, the decision, despite having few direct applications,[135] struck a responsive chord within the intergovernmental community and served as a effective reminder to lower courts, the Congress, and the White House[136] that state and local governments occupy a special status in American society as a matter of constitutional law.

FERC and *EEOC v. Wyoming,* while undercutting *National League of Cities,* at least left its symbolic value intact. *Garcia,* on the other hand, has done more than remove *National League of Cities* from the federalism landscape. Justice Blackmun's equally broad opinion counterposes a view of states as mere interest groups which, like Justice Rehnquist's vision, could carry over into other contexts.[137] As Judge Brown of the Fifth Circuit has observed in dissenting from a majority decision which held that Congress had not abrogated the states' eleventh amendment immunity when it enacted the Jones Act:

> *Garcia* is an important case not only for what it says, but for the posture in which the decision comes down. [As the] repudiation of . . . the watermark for state sovereignty . . . [i]t stands for the proposition that states must fight for their sovereignty in the political arena.[138]

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134. *See* Field, *supra* note 31, at 114. As of July 1986, *National League of Cities* had been cited 456 times by the lower federal courts.

135. *National League of Cities* has often been cited in cases where it has no direct application as standing for the importance of federalism considerations. *See, e.g.,* Pennhurst State School & Hosp. Supply v. Halderman, 451 U.S. 1 (1981) (eleventh amendment); Fullilove v. Klutznick, 448 U.S. 448 (1980) (Public Works Employment Act); Reeves v. Stake, 447 U.S. 429 (1980) (commerce clause market participant exception); City of Rome v. United States, 446 U.S. 156 (1980) (Voting Rights Act); Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (*ad valorem* property tax).

136. *See* La Pierre, *supra* note 45, at 785 & n.22.

137. For example, in Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 658 n.1 (E.D. Cal. 1986), both parties advanced "lengthy discussion[s]" regarding *Garcia*'s impact on the *Parker* "state action immunity doctrine" under the Sherman Act. The court, however, did not yield to this temptation and instead ruled that "*Garcia* simply does not affect this case." *Id.*

138. Welch v. State Dep't of Highways & Pub. Transp., 780 F.2d 1268, 1287 (5th Cir. 1986) (Brown, J., dissenting). *But see id.* at 1275-76 (Higginbotham, J., specially concurring) (finding "a more direct corollary of *Garcia*" to be that "federal statutes not expressly applicable to states" are not brought within a federal statutory scheme so as to invite intrusion into state affairs. "[I]f legislation is silent or half-heartedly ambiguous as to its effect on states, and a court later declares that it applies to states, the process will have been skewed and the states will have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and a return of the judges from the sidelines"). Indeed, one lower court has already drawn upon *Garcia's* underlying theme to emphasize in dicta the extent of Congress's power over the states. *See* Public Agencies Opposed to Social Sec. Entrapment v. Heckler, 613 F. Supp. 558, 562 (C.D. Cal. 1985) (citing *Garcia* to the effect that Congress could require the states to enroll their employees under Title II of the Social Security System). *See also* Blue Cross & Blue Shield v. Dep't of Banking, 791 F.2d 1501, 1504 n.4 (11th Cir. 1986) (citing *Garcia* as support for the "thought that the day had passed when a congressional action could be challenged simply on the ground that it

Indeed, several federal judges have seized upon *Garcia* to begin chipping away at the protection afforded the states by the eleventh amendment. The Court had earlier established that although states could be made to answer in federal court for violations of federal law, Congress would be deemed to have subjected the states to this jurisdiction under a given statute only if it had done so unequivocally.[139] The judges, reading *Garcia* to mean that Congress should generally be viewed as having fully exercised its powers vis-a-vis the states in the absence of an express limitation on its actions, sought to lower the threshold finding required to subject the states to suit in federal court.[140]

In *Atascadero State Hospital v. Scanlon,*[141] the Court foreclosed this application of *Garcia* by *raising* the threshold to require that Congress make its intention to override the states' immunity "unmistakably clear in the language of the statute."[142] Disagreeing with the Court, however, Justice Blackmun tellingly welcomed the judges' efforts to reconsider the abrogation doctrine:

> The Court's Eleventh Amendment cases spring from the same soil as the Tenth Amendment jurisprudence recently abandoned in *Garcia* . . . . The intuition underlying [them] is no truer to the federal structure or to a proper view of congressional power than was that underlying *National League of Cities.*[143]

Justice Blackmun's dissent is a sign that, having won an important battle in *Garcia,* he may continue to wage the fight on the several fronts where a *National League of Cities* outlook still holds sway. Should the Court ultimately reinstate the "traditional government functions" test, the *Garcia*

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is taken within a sphere of traditional state control"); Holland v. Burlington Indus., Inc. 772 F.2d 1140, 1148 (4th Cir. 1985) (generalizing *Garcia* to refute defendant's claim that the tenth amendment barred the federal government from applying ERISA to a private sector employer). *But see* North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. Federal Trade Comm'n, 615 F. Supp. 1155, 1162 n.7 (C.D.N.C. 1985) (clarifying that states are entitled to special disposition under ripeness tests in part because "[a]lthough the Commission would like the court to believe differently, *Garcia* . . . does not write the tenth amendment out of the Constitution").

139. *See* Quern v. Jordan, 440 U.S. 332, 342 (1979); Employees of the Dep't of Pub. Health & Welfare of Missouri v. Department of Pub. Health & Welfare of Missouri, 411 U.S. 279, 284 (1973).

140. *See* Welch v. State Dep't of Highways & Pub. Transp., 780 F.2d 1268, 1286-87 (5th Cir. 1986) (Brown, J., dissenting); Brotherhood of Locomotive Eng'rs v. New Jersey Transit Rail Operations, Inc., 608 F. Supp. 1216, 1221-22 (C.D.N.Y. 1985). *Cf.* Richard Anderson Photography v. Radford Univ., 633 F. Supp. 1154, 1160 n.13 (W.D. Va. 1986) (inferring from *Garcia* that the distinction between "governmental" and "proprietary" functions is no longer valid in the eleventh amendment context).

141. 105 S. Ct. 3142 (1985).

142. *Id.* at 3147.

143. *Id.* at 3179 (Blackmun, J., dissenting). *See also* Green v. Mansour, 106 S. Ct. 423, 432-33 (1985) (Blackmun, J., dissenting) (citing *Garcia* as evidence that "the Court's Eleventh Amendment approach is . . . sterile . . . and is in serious need of reconsideration").

dissenters will have done well, as Justice O'Connor put it, just "to hold the field and . . . render a little aid to the wounded."[144]

III. A TENTH AMENDMENT FOR THE NEXT CENTURY OF AMERICAN FEDERALISM

Even if the Court were to overrule *Garcia,* the reinstitution of the "traditional government functions" test would not directly loosen the federal government's indirect choke-hold on state and local governments. If federalism is to be taken seriously, the Constitution should be amended to blunt what Kansas State Senator Ross Doyen calls the Golden Rule of Intergovernmental Affairs: He who has the gold rules.[145]

Today's network of conditional intergovernmental grants can be traced back to the Lincoln Administration. The Morrill Act,[146] passed in 1862, provided the states with land grants for colleges, but only if the schools instituted a specified curriculum and complied with the Act's annual reporting requirements. Little did President Lincoln know where his innovation would lead. As of 1986, federal grants totaled $112.4 billion, and constituted 11.4% of total federal outlays and approximately 20.6% of total state and local expenditures.[147]

By the time the Reagan Administration took office, the intergovernmental grant system had become an administrative nightmare.[148] Despite six years of effort and some deregulatory process, the basic framework remains.[149] Some 81.7% of federal grants are categorical, meaning they carry with them legislative and regulatory mandates, often require matching funds from recipient governments, and afford state and local officials minimal

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144. *Garcia,* 469 U.S. at 580 (O'Connor, J., dissenting). *See, e.g.,* Manfredi v. Hazleton City Auth., 793 F.2d 101, 104 (3d Cir. 1986) (rejecting appellants' argument that *"Garcia* stands for the proposition that a federal court may construe a federal labor law, not specifically designed to protect public employees, to demand that such employees receive the protection of that law").

145. Address at the Advisory Commission on Intergovernmental Relations Symposium on *Garcia,* The Indiana University Workshop in Political Theory and Policy Analysis, Bloomington, Indiana (Feb. 18, 1986).

146. 12 Stat. 503 (1862).

147. *See* Special Analysis I, *supra* note 115, at H-22.

148. *See, e.g.,* J. Chubb, *The Political Economy of Federalism,* POL. SCI. REV. 994 (1985) (concluding that "contemporary federalism is not, as the traditionally sanguine view would have it, an efficient system for sharing the economic, political, and administrative responsibilities of modern government, but rather, one that, through the initiative of the national government, has become wasteful, cumbersome, and, as often as not, unsuccessful"); Stanfield, *What Has 500 Parts, Costs $83 Billion, and is Condemned by Almost Everybody — Answer: The Chaotic System of 500 Categorical Grant Programs,* Nat'l L.J. 4-9 (Jan. 3, 1981). In a study by the Advisory Committee on Intergovernmental Relations, state and local officials declared most federal regulations to be "expensive, inflexible, inefficient, inconsistent, intrusive, ineffective and unaccountable." Advisory Commission on Intergovernmental Relations, Regulatory Federalism: Policy, Process, Impact and Reform 3 (1984) [hereinafter Regulatory Federalism].

149. *See supra* note 113.

discretion in their use.[150] As of 1978, 1260 federal mandates were in place, 913 of which were conditions of federal assistance.[151] More recently, the Office of Management and Budget identified sixty-eight "crosscutting requirements": freestanding national policy requirements that apply to all federal financial assistance programs.[152] And as the web grows more tangled, the states' and cities' compliance costs become more prohibitive. One study revealed that it annually costs six selected cities $61.6 million to comply with just five mandates.[153]

Federal grants-in-aid have given new meaning to the old adage that "a helping hand can become a heavy hand."[154] In the course of his famous dissent in *New State Ice Co. v. Liebmann,*[155] Justice Brandeis noted that it was "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try naive social and economic experiments without risk to the rest of the country."[156] Federal grants not only usurp the tax base, thereby preventing states from raising tax dollars for their own initiatives, but also, through rigid conditions, promote often undesirable and almost always unimaginative national uniformity.

Finally, conditional federal grants-in-aid relegate the states to serving as little more than links in an administrative chain of command. Yet as Professor Daniel Elazar cogently argues, their true role under the Constitution is "to function as polities, not as middle managers . . . . [Their] principal tasks are to govern—to make and implement policies within their spheres of competence—not simply to administer programs developed outside of their jurisdiction."[157]

It is precisely this slighting of state prerogatives that led President Reagan to promise "to put an end to the money merry-go-round where our money becomes Washington's money, to be spent by the states and cities only if they spend it exactly the way the federal bureaucrats tell them to."[158] The

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150. *See* Special Analysis I *supra* note 115, at H-250.

151. *See* Statement of Dr. Adam Rose Before the Intergovernmental Relations Subcommittee of the Senate Government Operations Committee, Hearings on S. 483, The Intergovernmental Regulation Relief Act of 1985 (May 14, 1985).

152. Office of Management and Budget, Directory of Policy Requirements and Administrative Standards for Federal Aid Programs (1985).

153. Muller & Fix, *The Impact of Selected Federal Actions on Municipal Outlays,* in Joint Economic Committee of the U.S. Congress, 5 Special Study on Economic Change 368 (1980). The six cities selected were: Burlington, VT; Alexandria, VA; Cincinnati, OH; Dallas, TX; Seattle, WA; and Newark, NJ. The mandates involved the Clean Water Act, education of the handicapped, unemployment compensation, access for the handicapped, and bilingual education.

154. *See* Regulatory Federalism, *supra* note 148, at 3.

155. 285 U.S. 262 (1932).

156. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

157. Elazar, *States as Polities in the Federal System,* 70 NAT'L CIVIC. REV. 77, 77 (1981).

158. Address by Governor Ronald Reagan Accepting the Republican Party's Nomination for President, The Republican National Convention, Detroit, Michigan (July 17, 1980).

following amendment,[159] a variant of which was presented for consideration to the Advisory Commission on Intergovernmental Relations, would serve as a useful point of departure for reestablishing meaningful protection for state and local governments:

> Sec. 1. Congress shall pass no law abridging the freedom of the people of the several states to govern their own affairs, provide for a constitution and laws, raise revenue, secure public employees and otherwise structure the delivery of public services, or exercise all other powers necessary and proper to promote the general welfare. Nothing in this article shall be construed to restrict the power of Congress to enforce the provisions of this Constitution.
>
> Sec. 2(a). Congress shall pass no law placing conditions or restrictions on the expenditure of United States funds by any state or legal subdivision thereof unless the conditions or restrictions are agreed to under a contract between the United States and such state or legal subdivision providing for such funds to be paid directly by the United States into the treasury of such state or legal subdivision.
>
> (b). Conditions and restrictions placed by the Congress or the Executive Branch upon the expenditures of United States funds by any state or legal subdivision thereof shall, absent the consent of the latter, apply only to those funds paid under a program authorized in law enacted after the date of enactment of such conditions and restrictions.

Section 1 would buttress the "traditional government functions" test as articulated in *National League of Cities.* It would overrule *FERC* by guaranteeing the states a paramount right to organize the processes of state and local governments and would specifically overrule *Garcia.*

Section 2(a) would allow conditions to be imposed on the expenditures of federal funds only after specific contractual negotiations had taken place between the administering federal agency and the recipient state or local government. This measure would not only prevent Congress from covertly passing on the cost of such mandates to local government, but would also allow state and local officials more flexibility in tailoring federal programs to the needs of their jurisdictions.

Section 2(b) would prevent Congress from placing further conditions on a federal grant once a state or city had already begun to participate in the program. The section would also bar the government from unilaterally imposing new mandates in connection with programs already in existence before the effective date of Section 2(a).

This proposal will stir controversy, but the resulting debate could not raise a more vital question: What are the proper functions of the federal,

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159. The amendment is based on that proposed in the *Advisory Commission on Intergovernmental Relations, Reflections on* Garcia *And Its Implications for Federalism* 44, 47 (L. Hunter & R. Oakerson eds. 1986). The amendment proposed in this article should prove less controversial than that presented to the ACIR. In contrast to the ACIR proposal, which sought to reserve a substantive area of authority for the states over "local affairs," this article's proposal is narrowly tailored to provide relief only against direct regulation of local governments. Although one can debate the results of the federal government's expansion into policy areas previously regulated by the states, that is altogether another fight.

state, and local governments? Should Washington be in effect leveraging local action in policy areas such as energy, the environment, agriculture, transportation, community and regional development, education, worker training, food and nutrition assistance, and criminal justice?

Like the "traditional government functions" test, the amendment might also require some careful analysis by the courts. But does the vitality of our federalism, once called "the cardinal question of our constitutional system"[160] by President Woodrow Wilson, deserve any less?

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160. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1909).

FEDERALISM
STATEMENT OF PRINCIPLES
April 8, 1986

I. Federalsim is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

II. The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

III. The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

IV. The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

V. In most areas of governmental concern, State and local governments uniquely possess the constitutional authority, the resources, and competence to discern the sentiments of the people and to govern accordingly. In Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

VI. The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

VII. Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Founders.

VIII. Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments and private associations to achieve their personal, social, and economic objectives through cooperative effort.

IX. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

X. These principles should guide the departments and agencies of the national government in the formulation and implementation of policies and regulations.